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In the Supreme Court of the United States

OCTOBER TERM, 1958

NOS. –

UNITED STATES OF AMERICA, APPELLANT

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The three opinions of the district court are reported in 167 F. Supp. 45, 167 F. Supp. 799, and 168 F. Supp. 880, and are set forth in the appendix (1a–34a) of the appellant's jurisdictional statement in *Maryland and Virginia Milk Producers Assn.* v. *United States,* No. 898, this Term. This appendix, which we incorporate by reference, will be referred to as App. No. 898.

JURISDICTION

The United States brought this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and Section

15 of the Clayton Act, 15 U.S.C. 25, to prevent and restrain violation of Sections 1, 2, and 3 of the Sherman Act, and Section 7 of the Clayton Act. The district court entered partial judgments on November 10, 1958, January 22, 1959, and January 30, 1959 (App. No. 898, 35a–38a), all of which became final on the latter date (Rule 54(b), F.R. Civ. P.)

On January 9, 1959, the United States filed a notice of appeal from the judgment entered on November 10, 1958.[1] On March 23, 1959, it filed a notice of appeal from the same judgment and also from the judgment entered on January 22, 1959. The former notice of appeal was filed as a precaution against the possible finality of the November 10, 1958, judgment.

The jurisdiction of this Court to review by direct appeal the judgments entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Yellow Cab Co.*, 332 U.S. 218; *United States* v. *Radio Corporation of America*, 358 U.S. 334.

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[1] By an order entered by the district court on February 17, 1959, the time for docketing the case and filing the record with the Supreme Court pursuant to the notice of appeal filed on January 9, 1959, was extended from March 10, 1959, to and including May 22, 1959.

STATUTES INVOLVED

Sections 1, 2, 3, and 4 of the Sherman Act, Sections 6, 7, and 15 of the Clayton Act, and the Capper-Volstead Act, are set forth in App. No. 898, pp. 38a–45a.

QUESTIONS PRESENTED

1. Whether the Capper-Volstead Act and Section 6 of the Clayton Act confer upon an agricultural cooperative immunity from the prohibitions in Section 2 of the Sherman Act against monopolizing and attempting to monopolize.

2. Whether the district court, after finding that defendant's acquisition of Embassy Dairy was in violation of Section 7 of the Clayton Act and Section 3 of the Sherman Act, erroneously failed to provide adequate relief in:

(a) Refusing to order defendant to divest all assets used in operating Embassy Dairy as a going concern as of the date of divestment.

(b) Refusing to prohibit defendant from operating a dairy other than Embassy pending divestiture and for a reasonable period thereafter.

(c) Refusing to forbid for a reasonable period the acquisition by defendant of any new dairy unless defendant shows that such an acquisition would not substantially lessen competition or tend toward monopoly.

(d) Denying the Government visitation rights for the purpose of securing defendant's compliance with the court's judgment.

STATEMENT

The defendant is an agricultural cooperative association of nearly 2,000 milk producers supplying 86% of the fluid milk sold in the metropolitan Washington area (App. No. 898, p. 21a). Milk is delivered by each member to the association, which acts as a marketing agency selling to dealers, or dairies, for resale to the public. On July 26, 1954, the defendant acquired substantially all of the assets of Embassy Dairy, Inc., the fourth largest local milk dealer.

On November 21, 1956, the United States filed a civil antitrust action charging:

(1) That beginning in or about the year 1930, the defendant had attempted to monopolize, and had monopolized, by predatory and exclusionary conduct, trade and commerce in the supplying of raw milk to dealers in the Washington metropolitan area, in violation of Section 2 of the Sherman Act;

(2) That the defendant's acquisition of the Embassy assets had, and might have, the effect of substantially lessening competition or tending to create a monopoly in the production and sale of raw milk to, and the distribution and sale of pasteurized fluid milk by, Washington metropolitan area dealers, in violation of Section 7 of the Clayton Act;[2] and

(3) That the contracts under which the defendant acquired the Embassy assets were made, pursuant to

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[2] The defendant's acquisition of the so-called Richfield-Wakefield Dairy on December 6, 1957, was also challenged under Section 7, but was held to be legal under the "failing corporation" doctrine. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. No appeal is taken from this holding.

an unlawful conspiracy, for the purpose of eliminating Embassy as an outlet for raw milk produced by others, and to eliminate competition between Embassy and dealers purchasing raw milk from the defendant, in unreasonable restraint of trade and commerce in the Washington metropolitan area in violation of Sections 1 and 3 of the Sherman Act.

The defendant denied the alleged violations and claimed, as an affirmative defense, that its activities were exempt from prosecution under the antitrust laws by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act. On October 16, 1958, after a separate trial of this asserted immunity, the court ruled that the defendant qualified as an agricultural organization under Section 6 of the Clayton Act and the Capper-Volstead Act, and that under these statutory provisions it is exempt from the provisions of the antitrust laws "provided it does not enter into conspiracies or combinations with persons who are not producers of agricultural commodities" (App. No. 898, 11a). The court further ruled that the monopolization charges under Section 2 of the Sherman Act were barred by this exemption, but that the charges of violating Sections 1 and 3 of the Sherman Act and Section 7 of the Clayton Act were not (*id.*, 13a–14a).

The court accordingly, by its judgment of November 10, 1958, dismissed the monopolization charges (*id.*, 35a).

Prior to the entry of this judgment, the court proceeded with trial of the charge of violation of Section 7 of the Clayton Act. At the conclusion of trial of this issue the court rendered an opinion on November 21,

1958, holding that the defendant's acquisition of Embassy violated Section 7 of the Clayton Act (*id.*, 14a–31a). The parties stipulated that the Sherman Act charges should be determined on the record of the prior hearings, and the court by its opinion of January 14, 1959, held that the transaction involving the defendant's acquisition of Embassy violated Section 3 of the Sherman Act (*id.*, 31a–34a).

The judgment entered on January 22, 1959, adjudged that the defendant had violated both Section 7 of the Clayton Act and Section 3 of the Sherman Act (*id.*, 36a). The judgment entered on January 30, 1959, dismissed the claims for relief under Section 1 of the Sherman Act (*id.*, 37a–38a).

The judgment of January 22, 1959, ordered the defendant, within one year, to divest itself "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (*id.*, 36a). Pending divestiture, the defendant was ordered to administer the Embassy assets and the replacements therefor "in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (*ibid.*). The judgment also cancelled contracts between the defendant and the former owners of Embassy whereby the latter agreed not to engage in the sale or distribution of dairy products in the Washington metropolitan area for a period of ten years (*id.*, 37a).

In fashioning its decree, the court refused the Government's request that the defendant be required to

divest all assets used in operating Embassy as a going concern as of the date of divestment; that the defendant be prohibited from operating a dairy other than Embassy pending divestiture and for a reasonable period thereafter; and that the Government be granted visitation rights to enforce the decree. The court also rejected, without hearing argument, the Government's proposal that the defendant be prohibited for a reasonable period from acquiring any new dairy unless it shows that such an acquisition would not substantially lessen competition or tend toward monopoly.

The United States appeals from the dismissal of its action under Section 2 of the Sherman Act. It also appeals upon the ground that the court's judgment of January 22, 1959, fails to give adequate relief with respect to the defendant's violation of Section 3 of the Sherman Act and Section 7 of the Clayton Act. The defendant has appealed (No. 898, this Term) from the holding and judgment that its acquisition of Embassy violated Section 7 of the Clayton Act and Section 3 of the Sherman Act.

THE QUESTIONS ARE SUBSTANTIAL

1. Section 6 of the Clayton Act provides that the antitrust laws shall not be construed to forbid the "existence and operation" of agricultural cooperatives, or to forbid such organizations from "lawfully carrying out the legitimate objects thereof"; nor shall such organizations or its members be held to be "illegal combinations or conspiracies in restraint of trade, under the antitrust laws." Section 1 of the Capper-Volstead Act provides that persons engaged

in the production of agricultural products may act together in associations in "collectively * * * handling and marketing" such products in interstate commerce; and that such association may have "marketing agencies in common" and may make "the necessary contracts and agreements to effect such purposes". Section 2 of the Act provides that the Secretary of Agriculture, if he believes that such an association "monopolizes or restrains" interstate trade "to such an extent that the price of any agricultural product is unduly enhanced", shall file a complaint and if he finds, after a hearing, such undue enhancement of prices he shall issue a cease and desist order which is enforcible through district court proceedings under the charge of the Attorney General.

United States v. *Borden Co.*, 308 U.S. 188, held that an agricultural cooperative which had conspired with distributors of milk, a labor union, municipal officials, and others to fix prices and control supply was not within the exemptions of Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act.[3] The Court also held that Congress did not intend the proceeding by the Secretary of Agriculture authorized by Section 2 of the Capper-Volstead Act to be "a substitute for the provisions of the Sherman Act", or to bar a Sherman Act action against a conspiracy of the kind there involved absent a proceeding by the Secretary. 308 U.S. at 206. The

[3] For holdings as to the limits of the immunity given labor organizations by Section 6 of the Clayton Act, see *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797; *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 400.

Court, in reaching the conclusion that authorization of the administrative proceeding was not to be deemed an occupancy of the entire field of restraint and monopolization with respect to agricultural cooperatives, pointed out that the Capper-Volstead Act gave no express immunity from the Sherman Act and that, unlike the Sherman Act, it did not cover attempts to monopolize or provide penalties for past violation.

We do not contend that the *Borden* decision is fully determinative of the issue presented here—whether the Clayton Act and the Capper-Volstead Act confer upon an agricultural cooperative, not acting in combination or conspiracy with outsiders, absolute immunity to monopolize and to attempt to monopolize trade in an agricultural product. We assume also that the immunity conferred embraces a cooperative which, solely by reason of the voluntary membership of all local producers and without using any coercive or anti-competitive means, obtains a monopoly of marketing their output. Moreover, it is also assumed that a cooperative may sell at whatever price it chooses without transcending its immunity (subject to a proceeding by the Secretary of Agriculture if prices are thereby "unduly enhanced").

But these assumptions as to the scope of the immunity do not determine whether the Government's charge under Section 2 of the Sherman Act states a valid cause of action. Aside from the fact that the defendant controlled 86% of all fluid milk sold to dealers in the Washington Metropolitan area (App. No. 898, 21a), the complaint alleged that the defendant's monopolization and attempts to monopolize

had been effectuated by coercive, exclusionary, and anti-competitive means. Following the charge of monopolization and attempted monopolization in paragraph 21 of the amended complaint, paragraph 22 alleged in part:

> In effectuating the offenses hereinbefore charged, the defendant has, among other things:
>
> * * * * *
>
> b. Excluded, eliminated, and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers.
>
> c. Effected agreements with suppliers of milk, including agricultural cooperative associations, to eliminate competition between said suppliers and the defendant or to regulate the terms or conditions under which said suppliers would compete with defendant.
>
> d. Acquired and attempted to acquire dealer and manufacturing outlets by threats, inducements and other diverse means.
>
> e. Threatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets purchasing milk from producers not affiliated with the defendant.
>
> * * * * *
>
> g. Threatened and engaged in predatory pricing.
>
> * * * * *
>
> k. Eliminated and attempted to eliminate competition with its dealer-customers by deal-

ers purchasing milk from others than the defendant.

Section 6 of the Clayton Act, in its application to agricultural cooperatives, had as its primary purpose granting farmers freedom to act as a unit in marketing their products. This authorization permits them to pool crops, agree upon sales price, establish common processing and marketing agencies, and enter into sales contracts with outsiders. But *Borden* establishes that no blanket immunity from the antitrust laws is conferred, and the Court's opinion and reasoning do not suggest that combination with outsiders is the only circumstance under which a cooperative may transcend this immunity. The Government's appeal thus presents an issue not heretofore considered by this Court—whether the immunity embraces monopolization achieved by coercive or exclusionary means involving restraints of trade of a kind ordinarily cognizable under Section 1 of the Sherman Act. The issue whether a cooperative retains its immunity when it utilizes monopoly power, even if—unlike here—lawfully acquired, "to foreclose competition, to gain a competitive advantage, or to destroy a competitor" (cf., *United States* v. *Griffith*, 334 U.S. 100, 107), presents a question of law of large public importance meriting determination by this Court. Here, as in *Allen Bradley, supra*, there are "two declared congressional policies which it is [the Court's] responsibility to try to reconcile", and to determine "how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." 325 U.S. at 806.

Other lower federal courts have not construed the general language of the Clayton Act and Capper-Volstead Act as creating "so great a breach in historic remedies and sanctions" (*Borden* case, *supra*, 308 U.S. at 198) as would follow from the decision below in the instant case. *United States* v. *King*, 250 Fed. 908 (D. Mass.), held that a secondary boycott of "blacklisted" potato dealers was not a lawful means of carrying out the legitimate objects of a potato growers' association and was therefore not immune to prosecution under the Sherman Act. In *Gulf Coast Shrimpers & Oyster Ass'n* v. *United States*, 236 F. 2d 658, 665 (C.A. 5), certiorari denied, 352 U.S. 927, the court held a fishermen's association exceeded any privilege or exemption granted by the Fishermen's Collective Marketing Act[4] when it undertook not simply to fix the prices demanded by its members, but to exclude from the market all persons not buying and selling in accordance with its fixed prices. See also *Local 36 of International Fishermen, etc.* v. *United States*, 177 F. 2d 320, 332 (C.A. 9); *Manaka* v. *Monterey Sardine Industries, Inc.*, 41 F. Supp. 531 (N.D. Cal.). In *April* v. *National Cranberry Ass'n*, 168 F. Supp. 919, 923 (D. Mass.), the court expressly disagreed with the conclusion of the district court in the instant case that agricultural cooperatives are entirely exempt from the prohibitions of Section 2

[4] 15 U.S.C. 521. The language used in outlining the exemption is substantially identical with that in Section 1 of the Capper-Volstead Act.

of the Sherman Act,[5] and held that the Clayton and Capper-Volstead Act "did not make lawful purely predatory practices seeking to monopolize, forbidden to an individual corporation * * *." Accord, *Cape Cod Food Products* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass.).

2. The power of this Court to examine the relief granted by the district court in a Sherman Act proceeding and to order any modification deemed necessary or appropriate in order to protect the public interest is clear. *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571. "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus bypassing the usual appellate review, has always had the most careful scrutiny of this Court." *International Boxing Club* v. *United States*, 358 U.S. 242, 253. And see *Standard Oil Co.* v. *United States*, 221 U.S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 184–188; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185. The test is whether or not the required relief reasonably tends to dissipate the restraints and prevent evasions. *United States* v.

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[5] The court relied in part on the following statement in the report of the House Judiciary Committee on the Capper-Volstead Act (H. Rep. No. 24, 67th Cong., 1st Sess., p. 3): "In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them."

Bausch & Lomb Co., 321 U.S. 707, 726. And the purpose of a decree in a case of the type of this one is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401.

The district court, having held that the defendant's acquisition of Embassy's assets violated Section 7 of the Clayton Act and Section 3 of the Sherman Act, ordered a divestiture. The judgment requires the defendant, within a year, to "dispose of as a unit and as a going dairy business all [Embassy] assets * * * tangible and intangible, which it acquired on July 26, 1954, and replacements therefor", and requires the defendant, pending divestiture, to administer these assets in "good faith" so as to preserve them in as good condition as possible (App. No. 898, 36a). We submit that in several respects the judgment fails to provide sufficient safeguards to insure a divestiture which will result in establishment of an effectively competing independent dairy.

(a) The judgment should be modified so as to require the defendant to divest all assets used, as of the date of disposition, in the dairy business conducted under the trade name "Embassy Dairy". The assets presently so used include those acquired from Embassy in 1954, new equipment purchased by the defendant, and assets which it acquired in 1957 from the Richfield-Wakefield Dairy. The district court refused to determine in the decree, and postponed for future decision, whether the assets acquired from Richfield-Wakefield and as a result of improvements are

exempt from divestiture, or whether they are encompassed by the requirement that Embassy be sold "as a going dairy business". As this Court stated in *International Salt Co.* v. *United States,* 332 U.S. 392, 400, "it is desirable, in the interests of the court and of both litigants [including the Government], that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur."

Divestiture of Embassy in its present operating status is essential, not only to increase the likelihood of finding a purchaser, but also to make it possible for the new Embassy to develop into a significant independent competitive business. If, as the court intimated at one point (Tr. 967–968), the modern machinery and other assets added by the defendant are not within the divestiture order, it is doubtful whether the Embassy assets could be reorganized into a company that would survive, much less compete effectively with the other well-established dairies.

(b) The decree fails to provide adequate safeguards against a predivestiture impairment of the value of Embassy as a going concern, and against impairment of such value following divestiture. In the district court, the Government suggested that the defendant be prohibited from operating a dairy other than Embassy pending divestiture and for a reasonable time thereafter.[6] Such requirements not only

[6] The district court recognized that the defendant's operation of another dairy would "impair Embassy" (Tr. 929), but refused to prohibit such an operation (Tr. 930).

would make the Embassy business and assets more readily saleable, but also would permit a purchaser to consolidate his position without fear of having the defendant solicit or capture for its own dairy business present customers of Embassy.

(c) In view of the defendant's present market position and the district court's finding that Embassy was acquired with the specific intent to eliminate competition, the decree does not provide adequate control over future acquisitions by the defendant. The district court erred when it refused to consider, or hear argument on, the Government's proposal that the defendant be enjoined from acquiring any other dairy, unless it showed that such acquisition would not substantially lessen competition. Similar prohibitions have been held necessary or appropriate for adequate relief. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186–187; *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 130.

(d) The refusal of the district court to grant the Government visitation rights (Tr. 940–944), although contained both in the Government's and the defendant's proposed decrees, is a particularly serious handicap in the present case, since several significant provisions of the judgment depend for their effectiveness upon the defendant's compliance with a vague "good faith" standard. Without visitation rights, it will be extremely difficult for the Government to determine the defendant's compliance with the judgment. Moreover, the court denied visitation rights, not in the exercise of discretion on the facts of the case, but on the erroneous theory (see Tr. 941–942)

that such rights are comparable to an unlawful search and seizure.[7]

CONCLUSION

We submit that the questions presented by the appeal are substantial and of public importance.

Respectfully submitted.

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MAY 1959.

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[7] Visitatorial rights were upheld by this Court in *United States* v. *National Lead Co.*, 332 U.S. 319, fn. 4, and *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724–728 (full discussion of the problem).

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